

**Local No. 2007, International Brotherhood of Carpenters and Joiners of America, AFL-CIO and Oliver B. Cannon and Son, Inc. and Local No. 328, International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL-CIO. Case 23-CD-427**

December 9, 1982

## DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Oliver B. Cannon and Son, Inc. (hereinafter called the Employer), alleging that Local No. 2007, International Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereinafter called the Carpenters), violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by it rather than to employees represented by Local No. 328, International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL-CIO (hereinafter called the Painters).

Pursuant to notice, a hearing was held before Hearing Officer Donald R. Lewis on August 12 and September 13, 1982. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer and the Painters submitted a joint brief and the Carpenters also filed a brief, which have been duly considered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board makes the following findings:

### I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer is a corporation with its principal place of business in Philadelphia, Pennsylvania, and an office at 515 Nebraska, South Houston, Texas, where it is engaged as an industrial painting contractor in the building and construction industry. During the past 12 months, a representative period,

the Employer, in the course and conduct of its business operations, purchased and received products valued in excess of \$50,000 which were shipped for use in its operations in the State of Texas directly from points located outside the State of Texas.

Based on the foregoing, we find that Oliver B. Cannon and Son, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Painters and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

### III. THE DISPUTE

#### A. Background and Facts of the Dispute

The Employer is an industrial painting contractor engaged by Owens-Illinois, Inc., to perform certain repairs on the roof and ceiling of the No. 2 machine shop at its papermill located in Orange County, Texas.<sup>1</sup> Pursuant to the terms of this agreement, the Employer is erecting a false ceiling or scaffold directly under the machine shop roof to form a temporary covering of 5,400 square feet for the protection of the customer's equipment situated below. The suspension of this structure from the roof also serves another purpose of equal importance in that it provides a platform for sandblasting and painting operations on the plant's structural steel ceiling. When the repairs are completed, the Employer is responsible for dismantling the scaffold it has constructed.

Workers commence construction of the scaffold by hooking prefabricated square boxes onto the lower part of the ceiling trusses. After filling the gaps between the trusses with plywood strips, they insert aluminum beams that are about 22 feet in length into the boxes at intervals of 4 feet. Employees then place precut sheets of plywood on the beams and secure them by driving nails into the corners of each sheet. In some instances, they saw off the edges of these sheets to fit them around obstructions in the ceiling. The slight seams that form between the pieces of plywood are taped. Workers then cover this floor with a polyethylene substance that they tack down with a staple gun. During the final stage of this operation, they create sides for the platform by installing strips of plywood around the circumference of the floor and then stapling re-

<sup>1</sup> The Employer thereafter subcontracted the roofing work to another company.

inforced polyethylene to these wooden strips at the top and bottom of the enclosure. The finished structure has a solid floor with enclosed sides. After employees finish sandblasting and painting the ceiling, they remove the scaffold from the ceiling area.

The Employer has an existing collective-bargaining agreement with Painters District Council of Philadelphia (Pa.) and Vicinity, District Council No. 21. In performing the type of work involved in this dispute, the Employer assigns at least one permanent employee represented by the Painters to serve as its working foreman on the project. Furthermore, the Employer is required by this contract to abide by the terms of the local agreement applicable to the jobsite. Thus, when the Employer needs additional employees to assist its working foremen, it contacts the Painters hiring hall in the jobsite area. It has employed about 10 different employees on the Owens-Illinois project from the hiring hall operated by the Painters Local concerned herein.

On or about July 2, 1982,<sup>2</sup> the Employer assigned all the work required by its contract with Owens-Illinois to employees represented by the Painters. When Kenneth Pigg, then Carpenters assistant business agent, approached the Employer's working foreman on the project on July 8, he demanded that the Employer assign the work of erecting and dismantling the scaffold to Carpenters-represented employees. Pigg then contacted Jack Norris, vice president of the Employer's Texas branch, who indicated that the Employer was assigning this work to employees represented by the Painters in accordance with the Company's established practice. On or about July 14, the Carpenters established a picket line at the Owens-Illinois project to protest the Employer's alleged substandard working conditions. The pickets caused the cessation of all operations, including those of other employers, at the Owens-Illinois plant for 2 workdays. There has been no further picketing at the jobsite.

#### *B. The Work in Dispute*

The notice of hearing issued in this case describes the work in dispute as follows:

The erection of swinging scaffolds ("false ceiling") by placing I-beams between ceiling trusses and then placing plywood between the I-beams and covering the plywood in order to create a solid barrier between the construction on the roof and the machine room below at No. 2 Paper Machine Building at the Owens-

Illinois, Inc., facility, U.S. Highway 87, between Orange and Deweyville, Texas, and the removal of said swinging scaffolds.

It is evident from the record and briefs, however, that none of the parties to this proceeding agrees that "swinging scaffold" is a proper characterization of the temporary structure that the Employer is erecting at the Owens-Illinois plant. At the outset of the hearing, Carpenters proposed that the work in dispute be described as "[t]he erection and installation of a large area *specialty* scaffold and brackets to be used as a work platform . . . ." [Emphasis supplied.] By contrast, the Employer and the Painters state in their joint brief that they would classify these work tasks as the erection of "suspended" scaffolding.

Upon reviewing the record, we find that the scaffold being built by the Employer is a fixed structure attached to the ceiling trusses of the permanent facility. Thus, the term "swinging" employed in the notice of hearing does not accurately describe this type of scaffold. It is also clear that the Carpenters' description of this structure as a specialty scaffold is lacking in specificity. Moreover, the evidence also shows that prefabricated square boxes, rather than brackets as the Carpenters asserts, are used to hold the scaffold to the plant's ceiling trusses. In these circumstances, we agree with the Employer and the Painters that the term "suspended" constitutes the most appropriate description of the scaffold involved in this dispute. Accordingly, our determination of the instant dispute will encompass the following operations engaged in by the Employer:

The erection of a large area suspended scaffold ("false ceiling") to be used as a work platform and protective covering by attaching I-beams to the ceiling trusses with prefabricated square boxes and then placing plywood between the I-beams and covering the plywood with polyethylene in order to create a solid barrier between roof and ceiling repair work being performed and the machine room below at No. 2 Paper Machine Building at the Owens-Illinois, Inc., facility, U.S. Highway 87, between Orange and Deweyville, Texas, and the removal of said suspended scaffold.

#### *C. The Contentions of the Parties*

The Employer and the Painters contend that the Carpenters violated Section 8(b)(4)(D) of the Act by demanding the assignment of the disputed work to employees represented by it and then engaging in picketing for a proscribed purpose. They submit that an award of the disputed work to employees

<sup>2</sup> All dates are in 1982, unless otherwise indicated.

represented by the Painters is appropriate in view of their possession of the requisite skills, the Employer's present assignment and past practice, safety considerations, area practice, and efficiency and economy of the Employer's operations. These parties also contend that there is a real possibility that the dispute will continue to recur at this jobsite unless the Board makes a broad award of the work in dispute. They therefore request that the Board extend the scope of the work award to cover the performance of such work by any painting contract at the Owens-Illinois papermill involved in this dispute.

The Carpenters argues that the established past practice for the Sabine Area of the Gulf Coast encompassing this jobsite requires assignment of the disputed work to employees it represents. It emphasizes that in 1975 employees represented by the Carpenters performed similar work at the papermill where this dispute exists. Since it has the only comprehensive apprenticeship program of the two crafts involved in this proceeding, the Carpenters further contends that employees it represents have the necessary skills and experience to perform the disputed work more safely and efficiently than those represented by the Painters. Finally, the Carpenters asserts that the National Joint Board's decision of April 28, 1920, awarding the work of constructing "special designed scaffolds" to employees represented by it establishes a clear precedent for the assignment of the disputed work.

#### *D. Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (2) there is no agreed-upon method for the voluntary resolution of the dispute.

With respect to (1) above, the record discloses that on or about July 8, 1982, the Carpenters assistant business agent, Kenneth Pigg, demanded that the Employer reassign the disputed work to employees represented by the Carpenters. Following these discussions, the Carpenters commenced picketing at the Owens-Illinois jobsite on or about July 14, 1982. Based on the timing of the picketing and the Carpenters failure to contend otherwise, we conclude that there is reasonable cause to believe that an object of the Carpenters picketing was to force the Employer to assign the disputed work to employees it represents.<sup>3</sup> Accordingly, without

ruling on the credibility of the testimony at issue, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

With respect to (2) above, there is no evidence in the record and no party contends that an agreed-upon method exists for the voluntary resolution of this dispute. We therefore find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

#### *E. Merits of the Dispute*

Section 10(k) of the Act requires that the Board make an affirmative award of the disputed work after giving due consideration to various relevant factors.<sup>4</sup> As the Board frequently has stated, the determination in a jurisdictional dispute case is an act of judgment based on commonsense and experience in weighing these factors. The following factors are relevant in making a determination of the dispute before us.

##### *1. Board certifications and relevant collective-bargaining agreements*

There is no evidence that either of the labor organizations concerned herein has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees.

The Employer has no collective-bargaining agreement with the Carpenters. Further, its existing contract with Painters District Council No. 21, as noted, requires that it abide by all terms and conditions of the local agreement in effect where the work is situated. Upon examining the contract applicable to the Owens-Illinois jobsite, we do not find any provision that specifically covers the disputed work. Indeed, no party contends otherwise.

Accordingly, we conclude that the factors of Board certification and relevant collective-bargaining agreements are inconclusive and do not favor an award of the disputed work to either group of employees.

##### *2. Employer's present assignment and past practice*

Consistent with its practice for the past 13 years, the Employer assigned the disputed work to its employees who are represented by the Painters. The Employer also has expressed a preference that such work be performed by those employees. In view of the foregoing, we find that the Employer's present assignment and past practice favor an award of the

<sup>3</sup> *Laborers' Local 676 (Clyde Stewart Excavating Co., Inc.)*, 229 NLRB 664, 665 (1977).

<sup>4</sup> *N.L.R.B. v. Radio and Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO (Columbia Broadcasting System)*, 364 U.S. 573 (1961); *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

disputed work to employees represented by the Painters.

### 3. Relative skills and safety considerations

The evidence indicates that the disputed work is a basic operation requiring rigging, sawing, and hammering skills possessed by both groups of employees. It is essential, however, that they can perform these tasks in an environment of extreme heat while standing on a steel beam situated 40 feet above ground. The Employer permanently employs working foremen represented by the Painters who are experienced in the construction of suspended scaffolding. It utilizes these permanent employees to supervise less experienced groups of employees hired on a project-by-project basis. When hiring employees for a project, the Employer seeks persons with rigging skills who are "able to get around on steel good." In this instance, both groups of employees have previous experience in performing the disputed work. While Carpenters notes that employees it represents attend an apprenticeship program where they receive special instruction in this type of work, there is no evidence that the Employer's operations require such extensive training. Furthermore, it is clear that employees represented by the Painters are capable of performing the disputed work to the Employer's satisfaction.

Both the Employer and the Painters vigorously contend that safety considerations dictate an award of the disputed work to employees represented by the Painters. These parties argue that painters should be responsible for erecting the scaffold that will serve as their work platform for conducting sandblasting and painting operations. While it is true that no employee represented by the Carpenters will perform any work from this structure upon its completion, we conclude that both groups of employees have equal incentive to build a scaffold that will not collapse during its construction. As the Carpenters assistant business agent, Pigg, stated concerning this factor, "He's not going to build anything that's going to fall out from under him. His life is at risk when he's building that thing."

Accordingly, we conclude that the factors of relative skills and safety considerations are inconclusive and do not favor an award of the disputed work to either group of employees.

### 4. Area practice

Ed Fontenot, the Painters business agent, stated that employees represented by the Painters in the Sabine Area, who work for contractors such as the Employer, have constructed suspended scaffolds

for their exclusive use in the past. There also is evidence, however, that employees represented by the Carpenters have performed such work in this area of the Gulf Coast. In fact, as noted, carpenters previously erected a smaller scaffold of this type at the Owens-Illinois jobsite in 1975. Accordingly, we find that this factor does not favor an award of the disputed work to either group of employees.

### 5. Efficiency and economy of operations

Under the present assignment of the disputed work, employees represented by the Painters perform every function involved in the Employer's operations at this jobsite. The Employer therefore can perform the disputed work and that work entailed in sandblasting and painting the papermill's structural steel ceiling with one work force. Carpenters-represented employees, by contrast, are claiming only the construction and removal of the suspended scaffolding. Thus, it is evident that the fragmentation of the Employer's operations which would result from an assignment of the work to employees represented by the Carpenters would also require hiring additional employees to complete the same amount of work. In this situation, the Employer's working foreman represented by the Painters would stand idle while employees represented by the Carpenters performed the disputed work. Furthermore, the employment of carpenters to perform a segment of this project would be unnecessarily disruptive of the Employer's work process.

Accordingly, we find that the factors of efficiency and economy of operations favor awarding the disputed work to employees represented by the Painters.

### 6. Other factors

The Carpenters introduced evidence of a 1920 decision by the former National Joint Board setting forth its agreement with Bricklayers, Laborers and Plasterers that awards the work of constructing "special designed scaffolds or those built for special purposes" to employees represented by the Carpenters. Although the Painters was not a party to that dispute, the Carpenters claims that the determination there provides conclusive evidence of the custom and practice in the construction industry concerning the disputed work. The Carpenters points out that the Impartial Jurisdictional Disputes Board thereafter found that the 1920 agreement governed its dispute with the Painters over tubular scaffolding work. As the Carpenters concedes, however, the Painters was not signatory to the 1920 agreement awarding the work of erecting specialty scaffolds to employees represented by the

Carpenters. There also is no evidence that the Employer was a party to any of the disputes cited by the Carpenters or that it has agreed to be bound by determinations of the Impartial Jurisdictional Disputes Board. Accordingly, we conclude that the evidence submitted by the Carpenters does not control our resolution of this dispute.

#### Conclusion

Upon the record as a whole, and after full consideration of all the relevant factors involved, we conclude that the Employer's employees who are represented by Local No. 328, International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL-CIO, are entitled to perform the work in dispute. We reach this conclusion based on the Employer's present assignment, its past practice, and efficiency and economy of the Employer's operations. Accordingly, we shall determine the instant dispute by awarding the disputed work to employees represented by Local No. 328, International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL-CIO, but not to that Union or its members. Additionally, we find that the Carpenters is not entitled by means proscribed under Section 8(b)(4)(D) of the Act to force or require the Employer to assign the disputed work to employees represented by it.

#### Scope of the Award

The Employer and the Painters request that the Board issue a broad work award to cover the performance of the disputed work by any painting contractor at the Owens-Illinois papermill where the instant dispute exists. They contend that such an award is necessary to prevent future jurisdiction disputes at this jobsite. The record contains no evidence, however, which indicates that the Carpenters again will resort to means proscribed by Section 8(b)(4)(D) of the Act to obtain the disputed work as it becomes available there. We therefore

find that the issuance of the broad order sought by the Employer is not warranted in this case.<sup>5</sup> Thus, our present determination of dispute is limited to the particular controversy which gave rise to this proceeding.

#### DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Oliver B. Cannon and Son, Inc., who are represented by Local No. 328, International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL-CIO, are entitled to perform the work involved in erecting and dismantling the suspended scaffold on the Employer's project at the papermill operated by Owens-Illinois in Orange County, Texas.

2. Local No. 2007, International Brotherhood of Carpenters and Joiners of America, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Oliver B. Cannon and Son, Inc., to assign the disputed work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local No. 2007, International Brotherhood of Carpenters and Joiners of America, AFL-CIO, shall notify the Regional Director for Region 23, in writing, whether or not it will refrain from forcing or requiring Oliver B. Cannon and Son, Inc., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work to employees represented by it rather than to employees represented by Local No. 328, International Brotherhood of Painters and Allied Trades of the United States and Canada, AFL-CIO.

<sup>5</sup> See, e.g., *Local Union Number 417, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO (Spancrete Northeast, Inc.)*, 219 NLRB 986, 989-990 (1975).